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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

UNITED STATES OF AMERICA, *et al.*,
Petitioners,
v.
VALLEY BROADCASTING COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF NATIONAL ADVERTISERS, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF BROADCASTERS, ASSOCIATION OF NATIONAL ADVERTISERS, AND AMERICAN ASSOCIATION OF ADVERTISING AGENCIES, IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

Amici Curiae are associations of national and local broadcasters, advertisers, and advertising agencies.[1] They share a continuing commitment to preserving First Amendment protection for all forms of lawful speech, and have often appeared before the Court to urge broad

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[1] Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.2. This brief was authored by counsel for *amici curiae*, and no person or entities other than *amici curiae* made a monetary contribution to the preparation and submission of this brief.

protection for commercial speech. *Amici* respond to the Government's petition for *certiorari* to address the Government's request for a remand of this case, which is based on an unprecedented theory. The Government seeks review only for the opportunity to provide additional evidence—evidence which, if it exists, should have been presented in support of the Government's motion for summary judgment filed more than five years ago. The result sought by the Government would impose an unwarranted burden not only on the federal courts but on all those, like *Amici* and their members, who vigorously participate in the commercial marketplace of ideas.

The National Association of Broadcasters ("NAB"), organized in 1922, is a non-profit incorporated trade association of the nation's radio and television stations and networks, representing the American broadcasting industry. NAB has long been committed to the advancement of the freedom of America's broadcasters to transmit truthful commercial speech, to permit listeners and viewers to make informed and autonomous choices in the marketplace among lawful products and services.

The Association of National Advertisers ("ANA"), the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of business to advertise its lawful services and products. With more than 5,000 subsidiaries, divisions, and operating units, ANA members market a wide array of goods and services and account for a majority of the nation's annual national and regional advertising expenditures. As this country's principal community of commercial speakers, ANA has long been committed to the advancement of truthful commercial speech in aid of the right of America's consumers to make well informed choices in the marketplace.

The American Association of Advertising Agencies ("AAAA"), the national trade association of the advertising agency industry, represent more than 750 advertis-

ing agencies located throughout the United States. Members of the AAAA create and place approximately 80% of all national advertising, as well as significant portions of local and regional advertising. More than 100 AAAA member agencies provide promotion, advertising, and other strategic marketing services to clients in the gaming industries, including state and Indian nation lottery and casino operators. AAAA is dedicated to advancing the interests of the advertising industry and has for many years represented its members in connection with resisting governmental efforts to restrict commercial free speech.

Amici and their members, as broadcasters, advertisers, and advertising agencies, therefore, have a substantial interest in the ability of all commercial lottery operators to engage in truthful and nonmisleading commercial speech about their lawful products.

REASONS THE PETITION SHOULD BE DENIED

The Government's Petition for a Writ of Certiorari ("Petition") is based on a fundamental misconception of constitutional law. The Court in its commercial speech cases—decided both before and after the District Court granted summary judgment in this case—has required the Government to bear a heavy evidentiary burden to justify speech restrictions. The Ninth Circuit found that these cases mandated the conclusion that the Government failed to carry that burden, particularly in light of the Court's decision in *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995), which is dispositive of this case.

Far from raising constitutional issues, the essence of the Government's Petition is a procedural argument that it should be entitled to multiple bites at the litigation apple if it becomes dissatisfied with the strategic decisions it made in the trial court. The Government should be treated no differently than any other litigant which, having the burden of proof, fails to produce sufficient evidence to carry that burden despite having ample opportunity to

do so. The Petition should be denied, or, in the alternative, the Court should grant the Petition and summarily affirm the decision below.

I. THE COURT'S INTERVENING COMMERCIAL SPEECH DECISIONS DO NOT JUSTIFY ALLOWING THE GOVERNMENT AN ADDITIONAL OPPORTUNITY TO PRESENT EVIDENCE.

The Government seeks a remand of this case for additional evidentiary inquiry purportedly because it was unfairly "surprised" by the evidentiary burden this Court has required of the Government in commercial speech cases decided since the District Court granted summary judgment. These cases, however, add nothing novel to the long-standing requirement that the Government produce evidence to support commercial speech bans. Since at least 1980, 13 years before the District Court's judgment, this Court has demanded that the Government carry a heavy evidentiary burden to justify restrictions on commercial speech. The Government's failure to do so here is attributable to an inherently contradictory statutory scheme and the irremediable lack of any evidentiary support—not, as the Government contends, a change in the law that denied it the opportunity to present necessary evidence. The Court should not further burden the lower courts and the litigants with the fruitless exercise of allowing the Government multiple opportunities to present evidence in support of a statute that cannot be justified.

A. The Ninth Circuit's Decision Is a Routine Application of This Court's Commercial Speech Inquiry.

The Court has evaluated government restrictions on commercial speech for almost 20 years using the four factors established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). The Ninth Circuit based its decision in this case on the third part of the *Central Hudson* test, which requires the Government to prove that the restriction "directly advances the Governmental interest asserted." *Id.* at 564.

The Court continues to adhere to the same basic formulation of the third part of the test. In the more recent words of the Court:

> [I]n *Edenfield v. Fane*, we had occasion to *explain* the *Central Hudson* factor concerning whether the regulation of commercial speech "directly advances the governmental interest asserted." In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest "in a direct and material way." That burden "is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

Rubin v. Coors Brewing Co., 514 U.S. 476, at 486 (1995) (quoting *Edenfield v. Fane*, 507 U.S. 761, at 770-71 (1993)) (emphasis added).

Contrary to the Government's assertions, the Court's commercial speech decisions rendered since 1993, therefore, have reiterated and clarified, not substantially altered, the always heavy evidentiary burden required of the Government by *Central Hudson*—the same fundamental burden that applied when the District Court granted summary judgment against the Government in this case. Importantly, commercial speech cases decided prior to 1993 echo this Court's more recent descriptions of the *Central Hudson* test, and made the Government's constitutional burden abundantly clear in 1993. In *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990), for example, a plurality of the Court concluded that the State's lack of "empirical evidence to support its claim" resulted in failure to carry "the State's heavy burden of justifying a categorical prohibition against the dissemination of accurate factual information to the public." *Id.* at 108-09 (plurality opinion of Stevens, J.). And in an observation that is equally ac-

curate today, the Court stated in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), that "'recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Id.* at 478 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985)); *accord Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989).[2] The Court's extant commercial speech jurisprudence thus made clear the showing required of the Government.

In any event, *Coors Brewing* unequivocally mandated the Ninth Circuit's decision. The Court in *Coors Brewing* unanimously struck down a statutory ban on disclosing alcohol content on beer labels—a statute riddled with exceptions that allowed disclosure of this banned information through advertising and that actually required disclosure of alcohol content on the labels of distilled spirits. The Court found this regulatory scheme "irrational," explaining that "[t]here is little chance that [the regulation at issue] can directly and materially advance its aim, while other provisions of the same act directly undermine and counteract its effect." 115 S.Ct. 1585 at 1593.

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[2] *See also Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 at 340 (1986); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *In re R.M.J.*, 455 U.S. 191 (1982); *Metromedia v. San Diego*, 453 U.S. 490 (1981). Circuit court decisions in place in 1993 were equally clear in instructing the state and federal governments that they bear a heavy burden to justify commercial speech restrictions under the *Central Hudson* test. *See, e.g., Fane v. Edenfield*, 945 F.2d 1514 (11th Cir. 1991), *aff'd*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 946 F.2d 464 (6th Cir. 1991), *aff'd*, 507 U.S. 410 (1993); *Edge Broadcasting Co. v. United States*, 5 F.3d 59 (4th Cir. 1991), *rev'd*, 509 U.S. 418 (1993).

The Ninth Circuit properly found that 18 U.S.C. § 1304 and its exceptions are indistinguishable from the statutory scheme at issue in *Coors Brewing*. Section 1304 purports to prohibit broadcast advertising of *all* commercial lotteries, while Section 1307 allows such advertising when sponsored by a nonprofit or governmental organization, and 25 U.S.C. § 2720 exempts "any gaming conducted by an Indian tribe pursuant to [the Indian Gaming Regulatory Act]." The Ninth Circuit concluded, as this Court had in *Coors Brewing*, that "because section 1304 permits the advertising of commercial lotteries by not-for-profit organizations, governmental organizations and Indian Tribes, *it is impossible for it materially to discourage public participation in commercial lotteries.*" 107 F.3d at 1335 (emphasis added).

This case, therefore, presents no new issues that would justify review by this Court. The Court's prior commercial speech decisions, particularly *Coors Brewing*, are dispositive of the issues presented, rendering unnecessary any decision the Court could make except summary affirmance.

B. The Government Could Not Have Reasonably Relied on *Posadas* to Justify Its Failure to Carry Its Burden of Proof.

The Government nevertheless attempts to create a constitutional—rather than a procedural—issue by contending that, despite overwhelming authority requiring evidentiary support, the Government offered no evidence on the impact of the statutory scheme in sole reliance on the Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986). The Court in that case, according to the Government, "sustained the constitutionality of a similar restriction on gambling advertising . . ., and, in so doing, the Court had dismissed the significance of comparable statutory exceptions without any evidentiary inquiry." Petition at 21-22. The Government misinterprets the Court's decision in

Posadas, which failed to support the Government's actions in 1993 and cannot justify the Government's position now.

The statute and state interest at issue in *Posadas* were fundamentally different from the statutes and asserted interests presented here. The Puerto Rico statute (1) prohibited advertisements for casino gambling, (2) directed to residents of the Commonwealth, but (3) allowed local advertisements for other forms of gaming. The legislature's asserted interest underlying the statute was to reduce demand for casino gambling by Puerto Rico residents, and the Court concluded that allowing advertising for gambling *other* than casino gambling did not undermine this asserted interest. The Court, moreover, reached this conclusion, in part, as a matter of *fact*, based on *evidence* in the record of the distinction between casino gambling and other, more traditional kinds of gambling in Puerto Rico. *Id.* at 341-43.[3]

The federal statutes at issue here, in contrast, (1) prohibit *all* broadcasts of advertisements for *all* commercial lotteries (as defined in the statute, which includes casino gambling), (2) anywhere in the country, yet (3) expressly permit some of those same commercial lotteries (including casinos) to broadcast just such advertisements. As the Ninth Circuit correctly observed, the Government's stated innterest is to reduce public participation in *all commercial lotteries*, commensurate with the language of Section 1304. 107 F.3d at 1335. These statutes' broad sweep and internal and pervasive inconsistency stand in sharp contrast to the more narrow Puerto Rico statutes. The Court in *Posadas*, therefore, never addressed the issues raised in the plaintiff's challenge to the constitutionality of Section 1304, rendering patently unreasonable the Government's purported reliance on *Posadas* for the

[3] The Court further emphasized the intensely local nature of its ruling in *Posadas*, stressing the "unique cultural and legal history of Puerto Rico." *Id.* at 339 n.6.

unsupported proposition that no evidentiary inquiry was required in this case.

The Government's Petition and continuing reliance on *Posadas*, moreover, is a thinly veiled attempt to resuscitate the fully discredited "vice" exception to constitutional protection for commercial speech. The Government seeks the opportunity to present evidence to support its position that *any* reduction in the amount of advertising for gambling or other "vices" necessarily advances the Government's asserted interests. The Court, however, has already rejected that argument. Not only did the Court conclude in *Coors Brewing* that a statute cannot withstand *Central Hudson* scrutiny when it allows the same conduct the Government claims an interest in prohibiting, but the Court has expressly found that commercial speech concerning so-called "vices" is entitled to no less protection than commercial speech related to any other subject.[4] The Government, therefore, simply could not introduce any evidence —even if given the additional opportunity it seeks—that would rationalize the statutory scheme embodied by Section 1304 and its exceptions, much less justify it under the First Amendment.[5]

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[4] *Coors Brewing*, 514 U.S. at 487 n.2; *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 at 1522 (1996) (Stevens, J.). The Court in *44 Liquormart* also effectively overruled *Posadas*, a majority of the Justices finding that it no longer reflects the proper constitutional inquiry—at least as to part three ("direct and material advancement") and part four ("reasonable fit") of the four-part *Central Hudson* test. *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J.), 116 S. Ct. at 1522 (O'Connor, J., concurring).

[5] Indeed, the Government has acknowledged in its Petition that it presented such additional evidence to the District Court in New Jersey, which nevertheless held the same statute unconstitutional. *See Players Int'l, Inc. v. United States*, No. 96-4911, Slip. Op. at 14 (D.N.J. Dec. 16, 1997), *cited in* Petition at 11 n.5 ("It is illogical to believe that non-FCC regulated gaming, including casino gambling, does not promote the same social ills caused by FCC regulated gaming. Congress, in creating the exceptions in § 1304 and its

The Court instructed the Government that it bears a heavy burden to justify bans on commercial speech long before it moved for summary judgment in this case. The Government has failed to carry that burden as to Section 1304. The Government is not entitled to another opportunity to present evidence, if it exists, that it should have presented to the District Court in 1993 and would not affect the constitutional analysis if it were presented now.

II. THE GOVERNMENT IS NOT ENTITLED TO MULTIPLE OPPORTUNITIES TO SATISFY ITS BURDEN OF PROOF TO CORRECT PERCEIVED ERRORS IN ITS CASE PRESENTATION.

While touting the need for compilation of an "adequate" factual record before the Court can determine the constitutionality of a statute, the Government fails to mention that the fault for any deficiency in the record falls squarely on the Government's shoulders. This Court has never held, as the Government contends, that the federal judiciary has an independent obligation, regardless of the actions of the parties, to review constitutional challenges to federal or state statutes to ensure that the parties create an "adequate" record. The Court has treated such cases as it treats all cases: the party with the burden of proof must submit sufficient evidence to carry that burden, and that party will not prevail if it fails to do so. Having failed to carry its burden with the evidence it presented to the District Court, the Government is not entitled to another opportunity simply because it now believes that additional evidence is necessary—particularly when the Government fails to specify any relevant (much less poten-

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corresponding rules, did not suggest that Native Americans, charities, states or government organizations cause different social ills from those caused by regulated gaming."); *id.* at 21 ("The exceptions allow the same activities the government believes cause significant public harm.").

tially persuasive) additional evidence that it would present if given another opportunity.

The Government principally relies on a misreading of the Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) (*"Turner I"*), to support its position. The issue in *Turner I* was the constitutionality of "must-carry" regulations that require cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. The cable television plaintiffs and the broadcast industry defendants filed motions for summary judgment, and the government filed a cross-motion to dismiss. "Although the Government had not asked for summary judgment, the District Court, in a divided opinion, granted summary judgment in favor of the Government . . ., ruling that the must-carry provisions are consistent with the First Amendment." *Id.* at 632. This Court vacated the District Court's grant of summary judgment and remanded the case for additional findings of fact, concluding that "because there are genuine issues of material fact still to be resolved on this record, we hold that the District Court erred in granting summary judgment in favor of the Government." *Id.* at 667-68; *see id.* at 668-69 (Blackmun, J., concurring); 669-74 (Stevens, J., concurring in part and concurring in the judgment).

Far from recognizing an independent judicial obligation to ensure an adequate record, the Court's decision in *Turner I* stands only for the unremarkable proposition that a party is not entitled to summary judgment when genuine issues of material fact remain to be resolved.[6] The Court

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[6] The other cases the Government cites also support this same proposition. *See Askew v. Hargrave*, 401 U.S. 476 (1971) (per curiam) (finding that plaintiff had failed to present sufficient evidence to support a motion for summary judgment after concluding that the case should be remanded on abstention grounds); *Storer v. Brown*, 415 U.S. 724, 738-39 (1974) (finding that the evidence submitted by the state was insufficient to support the District Court's decision).

further noted that such a conclusion is particularly appropriate when the Government had not filed its own motion for summary judgment and thus had no opportunity to provide evidence supporting its position. As Justice Blackmun observed, the Government was entitled to such an opportunity when the Government's evidence was "submitted to defeat a motion for summary judgment" but was "not adequate to support one." *Id.* at 668. Here, the Government had every opportunity to present evidence in support of its own motion for summary judgment, as well as in opposition to the plaintiffs' motions. The Government, however, made the strategic decision not to attempt to produce evidence concerning the operation of the statutory scheme in support of their affirmative motion for summary judgment. Nothing in *Turner I* supports the Government's request to be insulated from the results of that decision and given another opportunity to present evidence that, if it exists, should have been presented long ago.

Turner I, moreover, presented the Court with unique circumstances that are not present in this case. The Cable Television Consumer Protection and Competition Act of 1992 at issue in *Turner I* was the result of Congress' first comprehensive efforts to regulate the cable television industry, as opposed to over-the-air broadcast television that has long been subject to federal oversight. The principal issue in that case was the applicable constitutional standard that should apply to the plaintiffs' First Amendment challenges to the new law—the strict scrutiny applied to government restrictions on fully protected speech; intermediate scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech; or the standard historically applied to broadcast television. Once the proper level of scrutiny was determnied, the issue then became whether, and the extent to which, the "unusually detailed statutory findings" based on three years of Congressional hearings—only a portion of which had been pre-

sented to the District Court—satisfied the applicable constitutional inquiry. *Id.* at 663-67 (plurality op. of Kennedy, J.).

The restrictions on broadcast advertising of commercial lotteries, in sharp contrast to the 1992 must-carry regulations, have been in existence for many years, and are not supported by any statutory findings, much less the extensive Congressional record presented to the Court in *Turner I*. The constitutional scrutiny to be applied to those restrictions, moreover, was established by the Court almost 20 years ago in *Central Hudson*, not as a matter of first impression in this case. *See supra* at pages 4-7. The Court's remand decision in *Turner I*, therefore, provides no support for the Government's novel contention that a remand is appropriate simply to correct the Government's failure to present sufficient evidence when it had the opportunity to do so.

The Government's conduct further undermines its claimed entitlement to additional opportunities to present evidence. After the District Court found Section 1304 unconstitutional, the Government made no effort to seek a remand for additional evidentiary inquiry as this Court continued to render commercial speech decisions that were contrary to the Government's interpretation of its obligation to produce evidence.[7] The Ninth Circuit expressly requested additional briefing on the applicability of *Coors Brewing*, but the Government's responding brief merely attempted to distinguish that case without ever mentioning the need for a remand should the court find it dispositive. *See* Supplemental Brief for the Appellants (May 17, 1995). Only when the Ninth Circuit relied on *Coors*

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[7] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. (1996); *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Ibanez v. Florida Dept. of Business & Professional Regulation*, 512 U.S. 136 (1994); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

Brewing to affirm the District Court's grant of summary judgment against the Government did the Government first contend that the case should be remanded for additional evidentiary inquiry.[8] The Court should not accept such obviously self-serving, as well as meritless, excuses for the Government's failure to present evidence sufficient to satisfy the heavy burden to justify its commercial speech ban that this Court has consistently required.

This Court need not, and should not, do the work of the Attorney General as well as its own. The Government, by its own admission, made a strategic decision not to present evidence on the operation of Section 1304 and its exceptions. *See* Petition at 8. The Government made a second strategic decision not to seek a remand from the Ninth Circuit in response to that court's request for briefing on the effect of *Coors Brewing*—the very case the Government now claims to be a surprise. The Court should not now grant *certiorari* to review this case simply because the Government wants a third "bite at the apple" to avoid the results of its own strategic choices.

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[8] Indeed, the Government has forcefully advocated in those cases in which restrictions on free speech have been upheld that intervening commercial speech decisions by this Court do *not* entitle the *plaintiffs* to a remand for the opportunity to present evidence. *See* Brief for United States as *Amicus Curiae* dated July 17, 1996, in *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore,* on remand to the Fourth Circuit after this Court vacated the decision below at 63 F.3d 1318 (4th Cir. 1995). The Government thus apparently believes that additional evidentiary inquiries are appropriate only if they would benefit the Government.

CONCLUSION

For the foregoing reasons, the Government's Petition for Writ of Certiorari should be denied, or, in the alternative the Court should grant the Petition and summarily affirm the decision below.

Respectfully submitted,

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